



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: P.B. Engineering Company

File: B-244640

Date: July 22, 1991

Denver C. Snuffer, Jr., Esq., Maddox, Nelson, Snuffer & Dahle, for the protester.

Daniel B. Hoyer, Esq., Haas & Najarian, for D.L. McLaughlin Company, Inc., an interested party.

M. Penny Ahearn, Esq., and David Ashen, Esq., Office of the General Counsel, participated in the preparation of the decision.

DIGEST

Bid with bid guarantee \$31,467 (or 24 percent) lower than required amount was properly rejected as nonresponsive; deficiency was not de minimis and could not be corrected after bid opening.

DECISION

P.B. Engineering Company protests the rejection of its low bid as nonresponsive under invitation for bids (IFB) No. N62474-89-B-2354, issued by the Naval Facilities Engineering Command for construction of magazine ventilators. We dismiss the protest without obtaining a report from the agency pursuant to our Bid Protest Regulations, since the facts establish that the protest is without legal merit. 4 C.F.R. § 21.3(m) (1991).

The IFB required a bid bond in the amount of 20 percent of the bid price to accompany the bid package. According to P.B. Engineering, at the bid opening it submitted the apparent low bid in the amount of \$657,335. The agency has informed our Office that the apparent next low bid from D.L. McLaughlin Company, Inc. was in the amount of \$770,000. On June 7, the agency notified the protester that its bid was considered nonresponsive because the bid bond it submitted was only in the amount of 15 percent of its bid price, or \$100,000, and not the required 20 percent, or \$131,467. P.B. Engineering then filed a protest with the agency; when that protest was denied, it filed this protest with our Office, arguing that the deficiency in penal amount was de minimis and should be waived as a minor informality.

A bid guarantee is a material part of a bid, and when a bond is required it must be furnished with the bid package. Drill Constr. Co., Inc., B-239783, June 7, 1990, 90-1 ¶ 538. The Federal Acquisition Regulation (FAR) requires the rejection of a bid as nonresponsive if it does not comply with a solicitation requirement for a bid guarantee. FAR § 14.404-2(i). In other words, a defective bond renders the bid itself defective, and necessitates rejecting the bid as nonresponsive. HTP Enters., Inc., B-235200, Apr. 27, 1989, 89-1 CPD ¶ 418. The penal amount of a bond is a material term and if it is insufficient it renders the bond defective and the bid therefore nonresponsive. Id.

An exception allowing acceptance of an otherwise acceptable bid with a deficient bid guarantee is provided for in FAR § 28.101-4(c)(2), which states that the contracting officer shall waive a noncompliant bid bond if "the amount of the bid guarantee submitted is less than required, but is equal to or greater than the difference between the offer price and the next low acceptable offer." This exception does not apply here, since the bid bond submitted by P.B. Engineering is \$12,665 less than the difference between its bid price and that of the next lowest bidder.

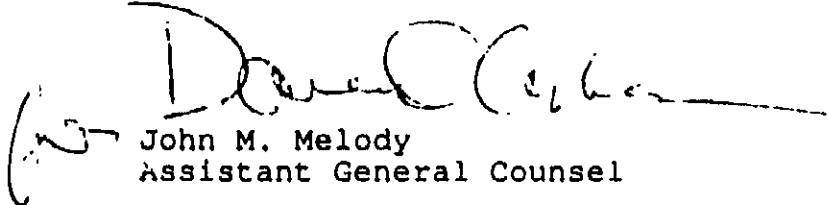
In arguing that the \$31,467 insufficiency in its bid bond is de minimis and should be waived, P.B. Engineering cites our decision in Arch Assocs., Inc., B-183364, Aug. 13, 1975, 75-2 CPD ¶ 106, wherein we held that a bid bond with a penal amount of \$284 less than the 20 percent of the bid price required by the IFB could be waived. Our decision there, however, was based on our determination that the \$284 shortfall in the penal amount--only 0.5 percent less than was required--constituted a minor informality subject to correction. In this regard, FAR § 14.405 permits waiver when the informality "pertains to some immaterial defect in a bid or variation of a bid from the exact requirements of the invitation that can be corrected or waived without being prejudicial to other bidders." Here, on the other hand, the required bid bond amount was \$131,467; the \$31,457 deficiency in the protester's bond is about 24 percent of the amount required. This deficiency is considerably in excess of the 0.5 percent shortfall in Arch Assocs. Inc., and we previously have held that similar deficiencies are not waivable as de minimis. See Consolidated Technologies, Inc., B-215723, Dec. 7, 1984, 84-2 CPD ¶ 639 (deficiency of \$26,190, 25 percent of the amount required); Capital Coatings, B-186608, June 28, 1976, 76-1 CPD ¶ 416 (deficiency of \$1,888, 16 percent of the amount required).

P.B. Engineering notes that it submitted subsequent to bid opening a certified check in the amount of \$31,467 to correct the deficient bid bond. An offer to make the bid responsive

by correcting the penal amount after bid opening may not be considered by the contracting activity; a nonresponsive bid cannot be made responsive after bid opening. Applying this standard, it is clear that P.B. Engineering's bond was defective and that its bid therefore properly was rejected as nonresponsive. Drill Constr. Co., Inc., B-239783, supra.

We conclude that P.B. Engineering's bid properly was rejected as nonresponsive.

The protest is dismissed.



John M. Melody
Assistant General Counsel